In the Matter of:

J. SCOTT BECHTEL, **ARB CASE NO. 06-010**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-033**

v. **DATE: March 26, 2008**

COMPETITIVE TECHNOLOGIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jason M. Zuckerman, Esq., ***Law Offices of Jason M. Zuckerman,*** **Washington, District of Columbia**

For the Respondent:
Mary E. Pivec, Esq., Julia H. Perkins, Esq., ***Sheppard Mullin Richter & Hampton, LLP,*** **Washington, District of Columbia**

ORDER OF REMAND

J. Scott Bechtel filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005). Bechtel alleged that Competitive Technologies, Incorporated (CTI) fired him in retaliation for, among other actions, his refusal to sign shareholder disclosure statements. A Department of Labor Administrative Law Judge (ALJ) concluded that CTI had not violated the SOX and dismissed Bechtel's complaint. Bechtel appealed to the Administrative Review Board (ARB). Because the ALJ did not clearly apply the legal burdens of proof in the SOX to her factual findings, we remand this case for further proceedings.

BACKGROUND

The ALJ provided a detailed account of the witnesses' testimony and documentary evidence. Decision and Order Dismissing Complaint (R. D. & O.) at 4-24. In view of our remand, we summarize the ALJ's findings of fact solely for background purposes.

Bechtel joined CTI in February 2001 as vice president of technology commercialization. His job consisted of assisting inventors and technical developers owning patents to manufacture and market their products and technologies.

In mid-June 2002, John Nano became CTI's Chief Executive Officer (CEO) and changed the business focus of the company because CTI had a net operating loss for the past two years. Nano's goal was to reduce overhead and generate immediate rather than long-range revenue for the company.

In early December 2002, following passage of the SOX, CTI asked Bechtel to participate in disclosure review meetings to comply with regulatory requirements. Over the next few months, Bechtel raised several concerns about CTI's financial reporting. These included the need to disclose on SEC reports: (1) oral agreements with licensees and consultants, (2) the threat of litigation from a client, (3) a major change in the employee compensation plan, (4) litigation to enforce patent rights, and (5) authority to license technologies. Bechtel refused to sign disclosure reports in December 2002 and March 2003 because he believed they were incomplete and would thus violate the SOX regulations.

CTI continued to show cash shortages and garnered few significant new revenue sources. At the end of May 2003, the Board of Directors approved Nano's plan to cut personnel and administrative costs. In mid-June 2003, CTI failed to obtain the bond funding it had sought to improve its cash flow. CTI also sold at a discount the monetary proceeds from litigation that it was due to receive.

Subsequently, Bechtel returned from a business trip to Korea and complained to Nano that CTI did not have the right to represent all the holders of patented technologies that it was trying to market to a Korean company, KTTC. On June 30, 2003, Nano fired Bechtel and another vice president because CTI "was in severe financial difficulty" and had to "reduce costs . . . to survive." TR at 836.

Bechtel filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on September 23, 2003. After investigating, OSHA found that CTI had violated the SOX in firing Bechtel and ordered his reinstatement. Both Bechtel and CTI requested a hearing, which the ALJ conducted on May 17-20, 2005, in New Haven, Connecticut.

The ALJ denied Bechtel's post-employment blacklisting claim; concluded that Bechtel had engaged in protected activity under the SOX, that CTI had knowledge of it, and that he suffered adverse action; yet held that CTI had legitimate business reasons related to its deteriorating financial condition for discharging Bechtel and that Bechtel had failed to establish that CTI's rationale was pretext. Accordingly, the ALJ dismissed Bechtel's complaint. R. D. & O. at 39, 44. He appealed to the ARB.

JURISDICTION

The ARB's jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 76 Fed. Reg. 64,272 (Oct. 17, 2002), which delegated to the ARB the Secretary's authority to review ALJ decisions issued under the SOX. 18 U.S.C.A. § 1514A.

The ARB reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b)(2007). In reviewing the ALJ's conclusions of law the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . . " 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

DISCUSSION

Although the ALJ's decision is extremely thorough and in most respects well reasoned, it was decided before a number of cases that discuss the scope, application, and burdens of proof in the then-new SOX law. Regrettably, the ALJ applied what now seem more clearly wrong legal tests to the facts as she found them. Our review is limited to an articulation of the correct burdens of proof in a SOX case, and to discussion of the manner in which the ALJ failed to apply those burdens in the R. D. & O.

The Legal Standards

The employee protection provision of the SOX generally prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. That provision states:

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies. - No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge,

> demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission [*see, e.g.*, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements], or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
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> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission [*see, e.g.*, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements], or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

Complaints filed under the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Platone v. FLYi,*

Inc., ARB No. 04-154, ALJ No. 2003-SOX-027, slip op. at 14-16 (ARB Sept. 29, 2006); *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, 36, slip op. at 9-10 (ARB June 2, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Platone*, slip op. at 16; *Harvey*, slip op. at 10; *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv). *See also Peck*, slip op. at 10.

The ALJ's Decision

The ALJ did not apply the legal standards just described to the facts that she found. We believe that she committed error in three particular ways: (1) in places, the ALJ appears to have substituted creating an inference of discrimination for Bechtel's burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action; (2) the ALJ required CTI to prove by clear and convincing evidence that it had a legitimate, non-discriminatory reason for taking the unfavorable action; instead, the statute requires that the respondent prove by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity; and (3) although CTI has a statutory defense to liability if it proves that it would have taken the same action in the absence of protected activity, the ALJ evidently determined that the defense would be lost if Bechtel were to prove that CTI's reasons were pretextual. We provide examples from the text.

First, under SOX, Bechtel must prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. It appears that the ALJ found this burden satisfied if Bechtel merely created an "inference" of a causal connection between his alleged protected activity and the termination of his employment. For instance, the ALJ concluded:

> Respondent contends that none of Complainant's activities contributed in any way to his discharge. I disagree. Considering Mr. Nano's expression of admiration for loyalty, his denial of conversations involving serious accusations concerning his character, and the fact that he brought people of his choice to the company after Complainant was terminated, I find that Complainant's vocal objections to Respondent's lack of authority to represent technology, and his continued concerns regarding

> disclosure of information, sufficient to establish the **inference of a causal nexus.**

R. D. & O. at 37 (emphasis added).

Elsewhere, the ALJ wrote that if "the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity[,] . . . then the **inference** of discrimination is rebutted." R. D. & O. at 26 (emphasis added). Again, "If Respondent is able to meet this burden [by adducing clear and convincing evidence], the **inference** of discrimination is rebutted." *Id*. at 37 (emphasis added). But CTI's burden to prove that it would have taken the same action does not arise when Bechtel has created an **inference** of discrimination. It arises only when Bechtel has **proven** discrimination by a **preponderance of the evidence**.

Second, under SOX, if Bechtel proves retaliation by a preponderance of the evidence, CTI can avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable action in the absence of Bechtel's protected activity. But the ALJ repeatedly referred to CTI's burden as one of producing evidence of a legitimate, non-discriminatory reason for its action: "The burden shifts to Respondent to present clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision . . ." *id*.; "Respondent's Clear and Convincing Evidence of Legitimate Motive for Adverse Action" *id*.; "I find that Respondent has established by clear and convincing evidence that it had legitimate business reasons for discharging Complainant," *id*. at 39. While CTI's proffered business reasons for its personnel decision are relevant to the inquiry, CTI's legal burden, if Bechtel proves his protected activity was a contributing factor, is to prove by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity. If CTI does that, the inquiry is over and CTI prevails.

Third, however, even if CTI demonstrated by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity, the ALJ gave Bechtel the opportunity to prove that CTI's reasons were pretext.

> [If] the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity[,] . . . then the inference of discrimination is rebutted, and to prevail, the complainant would need to show that the employer's rationale for the adverse action was pretextual.

Id. at 26.

Similarly, if CTI met the clear and convincing evidence burden, the ALJ wrote, "To prevail, Complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation." *Id*. at 37. The ALJ also entitled a

concluding section "Complainant's Burden to Show that Respondent's Legitimate Reasons are Pretextual." *Id*. In summing up, the ALJ wrote, "Complainant has failed to demonstrate that Respondent's rationale [for terminating Complainant's employment] is pretextual." *Id*. at 42. And again, "Complainant has failed to demonstrate that Respondent's rationale is pretextual, and that he was discharged in retaliation for his protected activity." *Id*. at 43.

While evaluating CTI's reasons for its personnel decision is an appropriate part of the analysis, the R. D. & O. incorrectly suggests that Bechtel's proof of pretext should come after and can defeat the CTI's statutory defense: clear and convincing evidence that it would have made the same personnel decision regardless of Bechtel's protected activity. If CTI satisfies that burden of proof, Bechtel cannot overcome it with proof that the reasons are pretextual. This, we believe, is the ALJ's third error.

CONCLUSION

We do not mean to suggest that application of the legal standards as we have outlined them will necessarily change the outcome of this case. On the other hand, we cannot say that it will not. And therefore a remand is necessary. To reiterate, the ALJ should determine whether Bechtel established by a preponderance of the evidence that his protected activity was a contributing factor in CTI's decision to fire him. If Bechtel meets his burden of proof, the ALJ should then determine whether CTI established by clear and convincing evidence that it would have taken unfavorable action against Bechtel absent his protected activity. If CTI meets this burden, then it will avoid liability under the SOX. If CTI does not, and providing that Bechtel has established his protected activity as a contributing factor of his discharge, then the ALJ should consider appropriate remedies under the SOX. *See* 18 U.S.C.A. § 1514A(c).

Accordingly, we **REMAND** for further proceedings consistent with this Order.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge